

¹ Gary Peterson retired effective March 31, 2003, and at the time of oral argument a replacement had not been appointed to complete the unexpired portion of his term.

2002. After January 21, 2002, when claimant was terminated because respondent was not able to accommodate her restrictions, the ALJ awarded claimant a 69.5 percent work disability based upon a 100 percent wage loss and a 39 percent task loss.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. Respondent argues claimant failed to make a good faith effort to find appropriate employment and a wage should be imputed to her. Respondent further argues the vocational expert testimony confirms claimant has the ability to make a comparable wage and consequently, her award should be limited to her functional impairment.

Conversely, claimant requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The parties agreed that claimant suffered a work-related injury on March 28, 2000, her first day at work for respondent. Claimant tripped on a broken conveyor belt which was on the floor. She fell and injured her left ankle and right knee.

Claimant was initially provided conservative medical treatment which included physical therapy, medications as well as a cortisone injection into her right knee. On September 25, 2000, claimant was referred to Dr. Robert P. Bruce, a board certified orthopedic surgeon, for treatment. Dr. Bruce diagnosed claimant's left ankle with an impingement syndrome, which is a condition where inflammatory tissue gets caught in the ankle, and she had a bone spur. The doctor diagnosed claimant's right knee with a lateral meniscus tear as well as chondromalacia.

Ultimately, Dr. Bruce performed surgery on claimant's left ankle to remove a bone spur on November 3, 2000. On February 2, 2001, the doctor performed an arthroscopic procedure on claimant's right knee which confirmed a lateral meniscus tear. A section of the cartilage was removed.

Dr. Bruce opined claimant sustained a permanent partial impairment of the left foot of 5 percent for a residual painful osteophyte and 5 percent to the left ankle for residual impingement syndrome. The ratings combined for a 7 percent permanent partial impairment to the lower extremity which converted to a 3 percent whole person impairment. In addition, claimant sustained a 20 percent permanent partial impairment to the right lower extremity at the knee for the lateral meniscus tear and chondromalacia of the patella. This rating converts to an 8 percent whole person impairment. Combining the whole person impairments, the doctor concluded claimant had suffered an 11 percent permanent partial

functional impairment to the whole body. Lastly, the doctor imposed permanent restrictions limiting claimant to 10 minutes of either standing or walking per hour.

Upon receipt of the permanent restrictions, claimant was told by respondent that she could no longer be accommodated and her employment was terminated on January 21, 2002. By this time claimant had suffered a separate injury to her right upper extremity and as a result of treatment and surgery for that condition she was temporarily and totally disabled from April 2002 through September 17, 2002.

When released to return to work in September 2002, claimant began a job search and was also receiving unemployment benefits. She was making two or three job applications a week. Claimant had also registered with Job Service. Claimant had been unsuccessful in finding a job when the regular hearing was held on October 24, 2002.

Permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e(a), which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.² In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the fact finder must determine an appropriate post-injury wage based on all the evidence before it.

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

It is undisputed that when Dr. Bruce released claimant from treatment in January 2002, the respondent was unable to accommodate her permanent restrictions and her employment was terminated. At that time claimant had apparently suffered an injury to her right hand for which surgery was ultimately performed in April 2002. The claimant was restricted from working and received temporary total disability benefits from April 2002 through September 17, 2002. The claimant did not testify regarding any job search she might have conducted between her termination in January 2002 and her surgery for her right hand in April 2002. The record does establish that claimant began her job search after she was released to return to work September 17, 2002, following recovery from her hand surgery. Consequently, the Board concludes claimant has failed to meet her burden of proof to establish she conducted a good faith job search until September 17, 2002.

As the ALJ noted, claimant began her job search after her release from treatment for her hand surgery and she had made between two and three applications a week in the approximate month and a half before the regular hearing was held in this claim. Claimant had also contacted job service as well as social and rehabilitation services for assistance in finding employment. The Board concludes claimant made a good faith job search after September 17, 2002, and accordingly the wage loss component of the work disability formula should be based upon her actual wage loss.

Stated another way, the Board concludes claimant did not make a good faith effort to find employment until after September 17, 2002, and accordingly is limited to her 11 percent functional impairment before that date. Commencing September 17, 2002, the claimant is entitled to a 69.5 percent work disability based upon a 100 percent wage loss and a 39 percent task loss.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated December 19, 2002, is modified to reflect claimant's work disability commenced September 17, 2002, and is affirmed in all other respects.

The claimant is entitled to 25.07 weeks temporary total disability at the rate of \$200.01 per week or \$5,014.25 followed by 44.54 weeks at the rate of \$200.01 per week or \$8,908.45 for an 11 percent functional whole body disability, followed by 236.89 weeks at the rate of \$200.01 per week or \$47,380.37 for a 69.5 percent work disability, making a total award of \$61,303.07.

As of August 29, 2003, there would be due and owing to the claimant 25.07 weeks of temporary total compensation at the rate of \$200.01 per week in the sum of \$5,014.25 plus 44.54 weeks of permanent partial compensation at \$200.01 per week in the sum of \$8,908.45, plus 49.57 weeks of compensation at \$200.01 per week in the sum of \$9,914.50, for a total due and owing of \$23,837.20, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of

\$37,465.87 shall be paid at \$200.01 per week for 187.32 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Roger D. Fincher, Attorney for Claimant
 Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
 Bryce D. Benedict, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director